Supreme Court, U.S.
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No. 01-1299

In The

Supreme Court of the United States

GREGORY C. WATTS,

Petitioner,

v.

THE CITY OF NORMAN, a political subdivision of the State of Oklahoma,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUSAN D. ROGERS
**Counsel of Record*

JEFF F. RALEY
JEFF H. BRYANT
RICKEY J. KNIGHTON, II
P.O. Box 370
201 West Gray
Norman, Oklahoma 73069
(405) 366-5423

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether The Tenth Circuit's Ruling That Watts, A Supervisor, Is Not Similarly Situated To Wilson, Watts' Subordinate, Is In Conflict With Decisions From Other Circuit Courts Of Appeal.

2. Whether Reversal Of The Tenth Circuit's Supervisor/Subordinate Ruling Would Change The Outcome Of This Case.

3. Whether Watts Has Standing To Challenge The Tenth Circuit's Ruling That He Established A *Prima Facie* Case Of Employment Discrimination Under The *McDonnell Douglas* Standard.

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INTRODUCTION

In the Court below, the three-judge panel for the Tenth Circuit Court of Appeals unanimously affirmed the district court's ruling that Respondent, the City of Norman, Oklahoma (City) was entitled to summary judgment in this employment discrimination case because Petitioner, Gregory C. Watts (Watts), failed to establish a material dispute of fact on the issue of pretext. *Watts v. City of Norman*, 270 F.3d 1288, 1297 (10th Cir. 2001). On appeal, Watts argued that evidence of pretext exists because the non-minority subordinate, Fireman Charles Wilson (Wilson), who was also involved in the October 31, 1998 incident that resulted in discipline against Watts, was not also subject to the same discipline. Watts believes that he is similarly situated when compared to the subordinate, and thus he argues that the comparison creates a question of fact sufficient to submit the issue of pretext to a jury.

The Tenth Circuit rejected Watts' argument finding that Watts and Wilson were not similarly situated because: (1) the basis for Watts' discipline was his failure *as a supervisor* to manage and de-escalate the situation that culminated in the physical confrontation – a job responsibility not shared by the subordinate; and (2) the qualitative evidence presented to the decision maker at the time the disciplinary decision was being made differed substantially as it related to Watts and Wilson. The Tenth Circuit identified the standard for determining whether employees are similarly situated at the pretext stage of an employment discrimination case evaluated under the *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) standard as a showing that the employer treated the

plaintiff differently from other similarly situated employees who violated work rules of comparable seriousness. *Id.* at 1295-1296 (citations omitted).

Watts' Petition for Writ of Certiorari to this Court argues that the Tenth Circuit determination that Watts and Wilson were not similarly situated, on the basis of "supervisor" to "subordinate" is not in harmony with Court of Appeals' decisions in other Circuits. Watts' Petition for Writ of Certiorari (Petition) at 6. However, as will be shown below, this Court should deny Watts' Petition because the Tenth Circuit's ruling that Watts is not similarly situated to the subordinate firefighter in any respect relevant to the pretext issue is based on an appropriate standard and is in harmony with the Court of Appeals' decisions outlined in Watts' Petition.

In addition, even if this Court were to conclude that the Tenth Circuit's supervisor/subordinate ruling is not in harmony with the decisions cited in Watts' Petition, this Court should still deny Watts' Petition because resolution of that issue would make no difference to the outcome of this case. As noted above, the Tenth Circuit also ruled that Watts was not similarly situated to Wilson because of the qualitative differences in the evidence considered by the decision makers at the time the disciplinary decision was made. This independent and alternative ruling is sufficient to uphold the Tenth Circuit's conclusion that Watts was not similarly situated to Wilson and it has not been challenged herein.

STATEMENT OF THE CASE

1. Statement of Facts

The City respectfully requests that this Court consider the following Statement of Facts, drawn from the record below, in addition to the facts submitted by Watts.

Watts began working for the City of Norman in April of 1976. He was hired as a firefighter and worked in that position for approximately six (6) years. In 1982, Watts applied for and was promoted to the position of driver. Watts worked as a driver for approximately six (6) years. In 1988, Watts applied for and was promoted to the position of captain. He worked in that position up until his resignation on December 4, 1998. Importantly, other than the decision challenged in this case, Watts does not allege that he was subject to an adverse employment decision during his twenty-two (22) year tenure with the City.

In October 1998, Watts was stationed at Fire Station Number 3 in Norman, Oklahoma. As captain, he was the individual in charge of the Station and responsible for supervising at least three (3) subordinate firefighters when he was on duty. On October 31, 1998, Watts was involved in a physical altercation with a firefighter under his command, Charles Wilson (Wilson), over use of the laundry facilities at the Station. According to the written statements of Watts, the incident began when he and Wilson began their shift at approximately 7:00 am and ended more than an hour later when Watts admittedly cussed Wilson and struck him on the side of his face.

Immediately after the incident, Wilson summoned Assistant Fire Chief John Vaughn (Vaughn) to resolve the conflict. When he arrived at Fire Station Number 3 on October 31, 1998 approximately forty-five (45) minutes after Wilson's call, Assistant Chief Vaughn spoke with Watts and Wilson. During his conversation with Assistant Chief Vaughn, Watts admitted that he cussed and struck Wilson. He also alleged that Wilson head-butted him. However, other than Watts' allegation, there was no evidence, physical or testimonial, to substantiate this allegation. During his conversation with Assistant Chief Vaughn, Wilson denied head-butting Watts and alleged that Watts was the aggressor in the physical altercation. At his deposition, Assistant Chief Vaughn stated that he could tell that Wilson had been struck because his face was "red and puffy."

Assistant Chief Vaughn relayed his conversations and observations to Fire Chief John Dutch (Dutch). Chief Dutch charged Assistant Chief Vaughn with conducting an investigation into the incident between Watts and Wilson. In addition to requesting a written statement from Watts and Wilson, Assistant Chief Vaughn requested written statements from the other firemen on duty at Fire Station 3 on October 31, 1998, Fireman Brian Starkey (Starkey) and Fireman Paul Harvey (Harvey).

In his written statement, Starkey stated that he saw Watts "step very close to Charles and did what I would describe as ranting and raving, flailing his arms and screaming obscenities. The very best I can recall, Greg said 'I'm running this f . . . place you cocksucker. I tell those goddamn guys what to do, not you.' " Starkey then recalls hearing a loud slap. Shortly thereafter, Wilson

contacted him. Although Starkey did not actually see Watts strike Wilson, he noticed that one side of Wilson's face was very "red and puffy."

In his written statement, Harvey stated that he saw Watts, "jump into Charles's face and at the top of his lungs yell, 'I'm fucking in charge here. You're not fucking in charge. I'll tell them what to do.' " Harvey further stated that he walked around the corner of the station and heard what he thought was a slap. Wilson later contacted Harvey and asked whether Harvey saw Watts hit him. Harvey stated that he did not see Watts hit Wilson but noticed that Wilson's face was "very red from the back of the ear to the front part of his jaw."

Based on this evidence, Chief Dutch concluded that Watts had verbally abused a subordinate, made physical contact with a subordinate, and intimidated and frightened employees of the Norman Fire Department. Chief Dutch decided that such acts could not be tolerated in the workplace and decided to terminate Watts' employment. However, under the collective bargaining agreement between the City and the local Firefighter's Union, Chief Dutch's decision was subject to review by the City Manager upon the filing of a grievance by the Union. The Union filed a grievance on Watts' behalf and City Manager Ron Wood (Wood) reviewed Chief Dutch's decision.

After reviewing the facts brought to light by Assistant Chief Vaughn's investigation and meeting with Watts, Watts' legal counsel, and representatives from Watts' Union, Wood decided that disciplinary action was appropriate under the circumstances. Wood reasoned that as supervisor, Watts should not have allowed the incident

to escalate to the point of physical confrontation. However, based on Watts' longevity with the City and his clear disciplinary record, Wood believed that the appropriate level of discipline for Watts was demotion to the non-supervisory position of firefighter. If Watts did not agree with Wood's decision, he could have requested binding arbitration. However, on the apparent advice of legal counsel Watts resigned on December 4, 1998. Thereafter, he filed this lawsuit against the City in the United States District Court for the Western District of Oklahoma alleging that he suffered an adverse employment decision based on his race, African-American, in violation of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. (Title VII).

2. Course of the Proceeding Below

Watts filed this lawsuit on August 20, 1999 in the United States District Court for the Western District of Oklahoma. In his Complaint, Watts alleged that he suffered an adverse employment decision based on his race, African-American, in violation of Title VII.

After filing an Answer and conducting discovery, the City moved for summary judgment under Federal Rule of Civil Procedure (FRCP) 56 on the grounds that the undisputed evidence in this case showed that: (1) Watts could not establish a *prima facie* case of employment discrimination under the standard articulated by the Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); (2) Watts could not establish a case of employment discrimination under a "mixed motive" theory; and (3) even if Watts could establish a *prima facie* case of employment

discrimination under the *McDonnell Douglas* standard, there was not a genuine dispute as to whether the legitimate non-discriminatory reason proffered by the City was pretextual – i.e., unworthy of belief.

In his response, Watts argued that he could establish a *prima facie* case of employment discrimination under the *McDonnell Douglas* standard, and proffered allegations of past racial discrimination in the City's Fire Department, hazing, and a comparison between himself and Wilson as evidence of pretext.

On May 23, 2000, the district court granted summary judgment in favor of the City. The district court ruled that although Watts had submitted enough evidence to establish a *prima facie* case of employment discrimination under the *McDonnell Douglas* standard, he did not submit any evidence on the issue of whether the City's legitimate non-discriminatory reason was a mere pretext for discrimination. Importantly, however, although the district court recited as one element of a *prima facie* case under the *McDonnell Douglas* standard the requirement that the plaintiff establish that "similarly situated white employees had been treated more favorably," the district court did not discuss whether Watts had established this element nor did the district court make a specific finding regarding the element.

Watts appealed the district court's ruling to the Tenth Circuit Court of Appeals. The Tenth Circuit affirmed the decision of the district court. In its Opinion, the Tenth Circuit correctly concluded that the only issue presented on appeal was whether Watts had presented evidence of pretext – i.e., evidence that a discriminatory reason more

likely motivated the City or that the reason the City gave for its treatment of Watts was unworthy of belief. *Watts*, 270 F.3d at 1294.

Regarding the pretext issue, the Tenth Circuit observed that one of the established methods of proving pretext is to show that the employer treated the plaintiff "differently from other similarly-situated employees who violated work rules of comparable seriousness." After observing its prior precedent regarding the comparison between a supervisor and subordinate in a disciplinary matter and the evidence in the record which showed that the City had heightened employment expectations of its supervisory employees, the Tenth Circuit concluded that Watts, a supervisor, was not similarly situated to Wilson, Watts' subordinate. *Id.* at 1293-1295.

The Tenth Circuit also concluded that Watts was not similarly situated to Wilson because of the qualitative difference in the proof against the two (2) men. Specifically, after noting that the appropriate standard for determining whether a proffered reason for an employment decision was pretextual is to examine the facts "as they appear to the person making the decision," the Tenth Circuit ruled that Watts was not similarly situated to Wilson because the thorough investigation conducted by the City prior to the challenged employment decision revealed the existence of corroborating evidence, including Watts' admission that he struck Wilson, in Watts' case, and the absence of such evidence in Wilson's case. The Tenth Circuit believed that this was a crucial difference from the point of view of an employer trying to decide what disciplinary measures it ought to mete out to the respective employees and, for that matter, what

actions it could later defend if challenged by the disciplined employee. The Tenth Circuit concluded that Watts and Wilson were not similarly situated in this regard either. *Id.* at 1296-1297.

PERCEIVED MISSTATEMENT OF FACT AND LAW IN WATTS' PETITION

In compliance with Supreme Court Rule 15, the following is a list of facts and law that bear on what issues properly would be before the Court if certiorari were granted that were either misstated or omitted by Watts.

1. Watts' Misstatement Regarding the Course of the Proceedings Below

A. The District Court Did Not Find That Watts Established That He Was Treated Differently Than Similarly Situated Individuals At The *Prima Facie* Case Stage Of The *McDonnell Douglas* Standard.

In his Petition, Watts asserts that "Notwithstanding the District Court's determination that Mr. Watts had established a *prima facie* case which included an element of 'similarly situated,' the Tenth Circuit affirmed summary judgment in favor of the City on the basis that Mr. Watts and Mr. Wilson were not 'similarly situated' at the *pretext* stage." Petition at 4. However, as noted above, although the district court recited as one element of a *prima facie* case of employment discrimination as the requirement that evidence be submitted to show that

"similarly situated white employees were treated more favorably," the district court did not address this element in its analysis or make a finding on the issue. The district court did, however, briefly address the issue in terms of whether there was sufficient evidence of pretext to overcome summary judgment.

As further noted above, on appeal, the Tenth Circuit observed that the district court recited but failed to address the similarly situated element, and observed that after the date of the district court's decision, it had ruled that the fourth element of the *prima facie* case of employment discrimination under the *McDonnell Douglas* standard does not require a comparison with a person outside the protected class. *Watts,* 270 F.3d at 1293. However, because the City did not challenge the *prima facie* ruling of the district court, the Appellate Court did not address the issue in depth. Instead, the Tenth Circuit focused its analysis on the pretext issue. Thus, contrary to the assertion in Watts' Petition, the Tenth Circuit did not affirm the district court's "determination that Mr. Watts had established his *prima facie* case which included the element of 'similarly situated.' "

2. Watts' Misstatement Regarding the Facts

A. After He Conducted An Investigation Into The October 31, 1998 Incident Between Watts And Wilson, Assistant Chief Vaughn Believed That Only Watts Should Be Dismissed.

In his Petition, Watts states that "After investigating the fighting incident, the Assistant Fire Chief for the City

of Norman, Johnny Vaughn, thought that both Mr. Watts and Mr. Wilson should be dismissed pursuant to the City's written and unwritten rules concerning fighting among firefighters." Petition at 5. The record in this case shows that after his ***initial meeting*** with Watts and Wilson, Assistant Chief Vaughn believed that both employees would be terminated. The record in this case further shows that after conducting an investigation into the October 31, 1998 incident between Watts and Wilson as directed by Chief Dutch and discussing the results of said investigation with Chief Dutch, Assistant Chief Vaughn changed his opinion regarding the appropriate level of discipline for Wilson only. Assistant Chief Vaughn based his change of opinion on the fact that there was no objective evidence to corroborate Watts' allegation that he was head-butted by Wilson.

B. Watts Was Disciplined For His Failure *As A Supervisor* To Manage And De-escalate The October 31, 1998 Incident That Culminated In A Physical Confrontation.

In his Petition, Watts states that "The City's decision to act contrary to its written and unwritten policies against fighting and discipline only Mr. Watts for the October 31, 1998 fighting incident was motivated by Mr. Watts' race." However, the record in this case shows that the discipline imposed on Watts as a result of the October 31, 1998 incident – i.e., demotion from the supervisory position of fire captain to the non-supervisory position of firefighter – was imposed because Watts, a supervisor, failed to manage and de-escalate the October 31, 1998 incident, and because he cussed and struck a subordinate

during the exercise of his authority as a supervisor in the City's Fire Department. The record does not show that Watts was discplined because he was involved in a fight.

REASONS FOR DENYING THE PETITION

1. The Tenth Circuit's Decision Regarding Watts' Argument That He Is "Similarly Situated" to Wilson, His Subordinate, Is Not In Conflict With The Decisions From Other Circuits Cited In Watts' Petition.

In his Petition, Watts argues that this Court should grant certiorari to resolve "widespread confusion and conflict among and within the Circuits regarding how to define a 'similarly situated' individual in a disparate treatment case based on circumstantial evidence and discriminatory discipline when the case is governed by the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) burden-shifting methodology." To support this argument, Watts cites cases from seven (7) other Circuit Courts alleged to be in conflict with the Tenth Circuit's decision in this case. However, a closer inspection of the cases cited by Watts reveals that the alleged conflict exists in semantics only.

Watts correctly notes that the "similarly situated" analysis used by federal courts to evaluate whether sufficient evidence exists to hold an employer liable for employment discrimination under the *McDonnell Douglas* standard has its genesis in *McDonnell Douglas, McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

Following the principles outlined by the Court in these cases, the Tenth Circuit and the Circuit Courts in each of the employment discrimination cases cited by Watts have articulated a standard that focuses on comparing and contrasting the conduct and/or employment expectations of the plaintiff and the individual(s) alleged to be similarly situated. The following is a brief synopsis of the decisions cited by Watts.

A. First Circuit

In the case of *Perkins v. Brigham & Women's Hosp.*, 78 F.3d 747 (1st Cir. 1996), the First Circuit identified the standard for determining whether a non-minority employee is similarly situated to the plaintiff at the pretext stage of an employment discrimination case evaluated under the *McDonnell Douglas* standard as: a showing that the individuals with whom the plaintiff seeks to be compared has "engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Perkins*, 78 F.3d at 751. Using this standard, the First Circuit concluded that the plaintiff's pattern of work-related sexual harassment did not compare with the misconduct of a non-minority supervisor. *Id.*

B. Second Circuit

Although the court in *Graham v. Long Island R.R.*, 230 F.3d 34 (2nd Cir. 2000) observed that the issue of whether

two employees are "similarly situated" ordinarily presents a question of fact for the jury in a disparate treatment case evaluated under the *McDonnell Douglas* standard, there is no indication in the court's opinion regarding the employment status of the individuals to which the plaintiff compared himself. However, the Second Circuit did identify the standard for determining whether a non-minority employee is similarly situated to the plaintiff at the *prima facie* case stage of the *McDonnell Douglas* standard as: a showing that the plaintiff and the employees to which he compared himself were subject to the same disciplinary standards and have engaged in conduct of comparable seriousness. *Graham*, 230 F.3d at 39-41.

In the case of *Hargett v. Nat'l Westminster Bank, U.S.A.*, 78 F.3d 836 (2nd Cir. 1996), *cert. denied*, 519 U.S. 824 (1996), the Second Circuit was not asked to determine whether the plaintiff was similarly situated to the individual to which the plaintiff compared himself. The issue in *Hargett* was whether the trial court erred by submitting an instruction to the jury that permitted it to consider the employment positions of the plaintiff and the individuals to which he compared himself. The Second Circuit rejected the plaintiff's argument that the Supreme Court ruled out consideration of the positions within the company held by the plaintiff and the individuals to which he compares himself in deciding whether persons treated differently were "similarly situated." *Id.* at 839.

The Second Circuit reasoned that the Court's decision in *McDonnell Douglas* does not imply that the determination of whether acts are of "comparable seriousness" requires a myopic examination of the acts alone without

regard to context or surrounding circumstances. The Second Circuit found that nothing in *McDonnell Douglas* precludes a finding that identical acts undertaken by persons of differing authority or in differing circumstances are in fact dissimilar. To illustrate this point, the Second Circuit noted that one could easily imagine a situation where language that might be tolerated in a back office would be unacceptable at a reception desk. ***The Second Circuit further noted that a corporate officer who is expected to lead others might well be held to a higher standard of conduct than a lower-level functionary.*** *Hargett*, 78 F.3d at 839.

In addition, Watts' suggestion that the mere fact that the similarly situated issue in *Hargett* was submitted to the jury does not support Watts' conclusion that the decisions of the Second Circuit are in conflict with the Tenth Circuit's decision in this case because there is no indication as to whether the defendant in *Hargett* raised the supervisor/subordinate issue in a motion for summary judgment prior to trial.

The Second Circuit's decision in the case of *Taylor v. Brentwood Union Free Sch. Dist.*, 143 F.3d 679 (2nd Cir. 1998), *cert. denied*, 525 U.S. 1139 (1999), does not support Watts' assertion that decisions from the Second Circuit are in conflict with the Tenth Circuit's supervisor/subordinate ruling in this case because: (1) *Taylor* involved a claim brought under 42 U.S.C. § 1983, and not Title VII; and (2) the Second Circuit did not address the defendant's assertion that the district court erred in submitting the issue of whether other school teachers and the plaintiff were similarly situated to the jury.

Furthermore, Watts' suggestion that the mere fact that the similarly situated issue in *Taylor* was submitted to the jury does not support his conclusion that decisions of the Second Circuit are in conflict with the Tenth Circuit's decision. Because the Second Circuit reversed the decision of the trial court on other grounds, it did not address the defendant's assertion that the district court erred by not determining as a matter of law that the school teachers to which the plaintiff compared himself were not similarly situated.

C. Fifth Circuit

In the case of *Okoye v. University of Texas Houston Health Science Center*, 245 F.3d 507 (5th Cir. 2001), the Fifth Circuit identified the standard for determining whether a plaintiff is similarly situated to the individuals to which she compared herself at the pretext stage of the *McDonnell Douglas* standard as: a showing that the misconduct for which the plaintiff was discharged was nearly identical to that engaged in by the other employee. *Okoye*, 245 F.3d at 514. Under this standard, the Fifth Circuit ruled that the plaintiff was not similarly situated to the three (3) physicians to which she compared herself because the physicians were not accused of assaulting a co-worker and they were not barred from the jail where they and the plaintiff worked. *Id.* at 514-515.

D. Sixth Circuit

In the case of *Mitchell v. Toledo Hospital*, 964 F.2d 577 (6th Cir. 1992), the Sixth Circuit identified the standard for determining whether a plaintiff is similarly situated to

the individuals to which she compared herself at the *prima facie* case stage of the *McDonnell Douglas* standard as: a showing that the individuals with whom the plaintiff seeks to compare his/her treatment: (1) dealt with the same supervisor; (2) were subject to the same standards; and (3) had engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it. *Mitchell,* 964 F.3d at 582-583. Under this standard, the Sixth Circuit found that the plaintiff had not produced any admissible evidence to establish that the white employees she identified as not having been fired although they kept medicare checks and personal checks payable to their employer hidden in their desks and other non-minority employees' absenteeism and insubordination were of "comparable seriousness" to the conduct for which the plaintiff was discharged.

In the case of *Ercegovich v. Goodyear Tire & Rubber Co.,* 154 F.3d 344 (6th Cir. 1998), the Sixth Circuit identified the standard for evaluating whether a plaintiff is similarly situated to the individuals to which he compares himself at the *prima facie* stage of the *McDonnell Douglas* standard as applied to an age discrimination case as: a showing that the plaintiff and the employee with whom the plaintiff seeks to compare himself are similar "in all of the *relevant* aspects." *Ercegovich,* 154 F.3d at 352. Under this standard, the Sixth Circuit ruled that the plaintiff's comparison between himself and two younger employees that were offered new positions after their current positions were eliminated was sufficient to establish the fourth element of a *prima facie* case of age discrimination under the *McDonnell Douglas* standard. *Id.* at 353.

In addition, because the trial court had concluded that the Sixth Circuit's decision in *Mitchell* precluded a finding that the plaintiff was similarly situated to the two younger employees, the Sixth Circuit distinguished its decision in *Mitchell* from facts in *Ercegovich* on the grounds that *Mitchell* involved a disciplinary matter whereas *Ercegovich* did not. The Sixth Circuit cautioned that although the standard articulated in *Mitchell* appears to invite a comparison between the employment status of the plaintiff and other employees in every single aspect of their employment, *Mitchell* had not been so narrowly construed in subsequent opinions. *Ercegovich*, 154 F.3d at 352 (citation omitted).

The Sixth Circuit further cautioned that courts should not assume that the specific factors discussed in *Mitchell* are relevant factors in cases arising under different circumstances. Instead, the court instructed, a court should make an independent determination as to the relevancy of a particular aspect of the plaintiff's employment status and that of the non-protected employee. The Sixth Circuit concluded that a plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered "similarly-situated." Rather, the plaintiff and the employee with whom the plaintiff seeks to compare himself or herself must be similar in "all of the *relevant* aspects." *Ercegovich*, 154 F.3d at 352.

The Sixth Circuit's clarification of its standard for determining whether individuals are similarly situated in *Ercegovich* is the apparent source of the alleged "intracircuit split" observed by Watts and the legal commentary cited in Watts' Petition. Petition at 16 (citing David L.

Hudson, Jr., *Will the Sixth Circuit Stick to One Standard with Respect to Similarly Situated Employees,* Tenn. B.J. 25 (November 2001)). However, the Sixth Circuit decision in *Ercegovich* clearly states that the factors that should be considered when attempting to determine whether individuals are similarly situated are not static, and thus factors that may be relevant in a disciplinary context are not necessarily relevant in cases arising in a different context. (emphasis added).

E. Eighth Circuit

In the case of *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968 (8th Cir. 1994), the Eighth Circuit identified the standard for determining whether the plaintiff is similarly situated to the individual to which he compares himself at the pretext stage of the *McDonnell Douglas* standard as: a showing that employees are involved in or accused of the same offense and are disciplined in different ways. *Harvey*, 38 F.3d at 972. Under this standard, the Eighth Circuit found that the plaintiff was not similarly situated to his subordinate because although they were involved in the same incident, the evidence showed that the defendant employer held the plaintiff, a supervisor, to a higher standard than the subordinate to which the plaintiff compared himself. *Id.*

In the case of *Ward v. Procter & Gamble Paper Products Co.*, 111 F.3d 558 (8th Cir. 1997), the Eighth Circuit identified the standard for determining whether the plaintiff is similarly situated to the individual to which he compares himself at the pretext stage of the *McDonnell Douglas* standard as a showing that the employees were involved

in or accused of the *same offense* and were disciplined in different ways. *Ward*, 111 F.3d at 560. Under this standard, the Sixth Circuit ruled that the plaintiff was not similarly situated to her supervisor because although they were involved in the same fight, they did not commit the same offense. The Sixth Circuit further ruled that the plaintiff and her supervisor were not similarly situated because they did not hold the same position and they did not share similar employment records. *Id.* at 561.

F. Eleventh Circuit

In the case of *Manniccia v. Brown*, 171 F.3d 1364 (11th Cir. 1999), the Eleventh Circuit identified the standard for determining whether employees are similarly situated for purposes of establishing a *prima facie* case under the *McDonnell Douglas* standard as: a showing that the employees were involved in or accused of the same or similar conduct and were disciplined in different ways. *Manniccia*, 171 F.3d at 1368. The Eleventh Circuit reasoned that it requires that the quantity and quality of the comparator's misconduct be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges. *Id.* Under his standard, the Eleventh Circuit found that the plaintiff was not similarly situated to the individuals to which she compared herself because each of the comparators were accused of a single incident of misconduct or alleged misconduct, whereas the plaintiff had committed at least four policy violations. In addition, the Sixth Circuit found that there was no evidence which showed that the comparators had used confidential information accessible

only to police officers for non-police purposes, whereas the plaintiff had. *Id.*

2. Even If This Court Concluded That The Decision Of The Tenth Circuit In *Watts* Is In Conflict With The Decisions Outlined In Watts' Petition, Said Petition Should Still Be Denied Because Resolution Of The Supervisor/Subordinate Issue Would Not Change The Outcome Of This Case.

Even if this Court were to conclude that the decision of the Tenth Circuit in *Watts* regarding a supervisor/subordinate comparison was in conflict with the decisions from other Circuit Courts cited in Watts' Petition, this Court should still deny Watts' Petition because it would be extreme and startling for this Court to grant certiorari to resolve the supervisor/subordinate issue when resolution of that issue in Watts' favor would not change the outcome of this case. See 16B. Wright & A. Miller, Federal Practice and Procedure Juris. § 4004.3, n. 8 (2d ed. 2002) (observing that the grant of certiorari in circumstances that could not lead to reversal would be extreme and startling).

In addition to ruling that Watts, a supervisor, was not similarly situated to Wilson, Watts' subordinate, because the undisputed facts relevant to the reason Watts was disciplined did not apply to Wilson, the Tenth Circuit also ruled that Watts was not similarly situated to Wilson because there were qualitative differences in the evidence considered by the decision makers at the time the disciplinary decision was made. *Watts*, 270 F.3d at 1269. This alternative and independent ruling has not been challenged by Watts. Moreover, it is sufficient to uphold the

decision of the Tenth Circuit in *Watts* regardless of whether the supervisor/subordinate holding of the Tenth Circuit is reversed.

3. Watts Lacks Standing To Challenge The Tenth Circuit's Ruling That He Established A *Prima Facie* Case Of Employment Discrimination Under The *McDonnell Douglas* Standard.

In his Petition, Watts contends that this Court should grant certiorari to resolve an alleged conflict between the Tenth and Seventh Circuits on the issue of "whether to apply the similarly situated test in the *prima facie* case stage of the *McDonnell Douglas* analysis, in the *pretext* stage, or both." However, the Tenth Circuit ruled that Watts established a *prima facie* case of employment discrimination under the *McDonnell Douglas* standard, and thus Watts, the successful party below on this issue, does not have standing to appeal the Tenth Circuit's ruling on this issue. See *Public Service Commission of Missouri v. Brashear Freight Lines*, 306 U.S. 204, 59 S.Ct. 480, 83 L.Ed. 608 (1939) (citations omitted) (observing that the successful party did not have standing to appeal the decision of the court below).

CONCLUSION

Based on the above, and foregoing, the City respectfully requests that Watts Petition for writ of certiorari be denied.

Respectfully submitted,

SUSAN D. ROGERS
Assistant City Attorney
*Counsel of Record

JEFF F. RALEY
City Attorney
JEFF H. BRYANT
Assistant City Attorney
RICKEY J. KNIGHTON, II
Assistant City Attorney
Office of the Norman City Attorney
P.O. Box 370
201 West Gray
Norman, Oklahoma 73070
(405) 366-5423

Attorneys for Respondent
The City of Norman, Oklahoma